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POWER TO REMAND TO CUSTODY VAGRANTS AND HABITUAL OFFENDERS.

As regards persons likely to commit a breach of the peace or to disturb the public tranquility, a discretion is given to Magistrates to arrest the suspect and to detain him in custody until the completion of the inquiry preliminary to taking security. The question is whether the magistracy is vested with any such power, pending an enquiry under S. 109 or S. 110 of the Code of Criminal Procedure. The police are vested under S. 55 (C. Pr. Code) with power to arrest such persons without an order from a Magistrate and without a warrant and Ss. 60 and 61 of the Code indicate clearly the next step to be taken by the Police officer making such an arrest. Has the Magistrate any power to prolong police custody under S. 167 of the Code? Is he bound to release the suspect on taking a recognizance from him (without sureties) for his appearance at the inquiry or has he power to require sureties for appearance and to remand to custody when sureties are not forthcoming? and lastly, has the Magistrate power to remand the suspect to custody without the option of bail? If he has such power, can any of these powers be exercised by a Magistrate before whom the suspect is produced by the Police, though such Magistrate is not empowered to hold an inquiry into the matter?

It would appear that the legislature has advisedly refrained from empowering the magistracy to remand to custody persons against whom proceedings under S. 109 or S. 110 are pending. In the case of a person likely to disturb the public tranquility, the safety of the public may imperatively demand that the suspect should be deprived of his liberty until it is finally decided whether he should be required to give adequate security for the preservation of the public peace or not. But in the case of a vagrant or habitual thief, the mischief he is capable of, is not in the first place of a far-reaching character and

further the knowledge that proceedings under S. 109 or S. 110 have been instituted would in itself act as a powerful deterrent and minimise the evil consequences, if any, resulting from his being allowed to be at large during the pendency of the enquiry without security being taken from him. After all, it is the primary duty of the police to prevent crimes likely to be committed by persons of this class whose victims are generally few in number, while it may be beyond the powers of the police to prevent a serious breach of the peace affecting public tranquility, if a person sought to be bound over under S. 107 is allowed to remain at large. No doubt even in the case of an habitual offender, after the termination of the enquiry he can be imprisoned if he is unable to furnish security for his behaviour; but it was evidently contemplated that during the brief interval between the initiation of proceedings and the conclusion of the enquiry, police surveillance would prevent the mischief and in any event the harm resulting from his being at large would be infinitesimally small as compared with the injury resulting from his being deprived of his liberty, should it ultimately turn out that the suspicion against him was unfounded or insufficient in details to substantiate by legal evidence a charge under S. 109 or S. 110 of the Code.

This distinction is not always kept in view. In *King Emperor v. Paimal Nai* [1] a judge of the eminence of *Sir George Knox* seems to suggest that a person suspected to come under S. 110 of the Code may be detained in custody if the Magistrate has the necessary information under which he could make the preliminary order in writing as required by S. 112 of the Code; but the *proviso* to S. 114 of the Code leaves absolutely no room for doubt, and the discretionary power vested in the Magistrate is confined to those cases where breaches of the public peace cannot be prevented otherwise than by the immediate arrest of the suspect.

It may also be noted that the Legislature has provided that the enquiry into cases of alleged breach of the peace shall be conducted in the same way as summons cases while the inquiry in good behaviour cases shall follow the procedure laid down as nearly as may be for the trial of warrant cases. Now it may at first sight appear, a warrant case being a more serious offence than a summons case, a good behaviour case is

1. (1912) 10 All. L. J. 351=13 Cr. L. J. 827=17 Ind. Cas. 571.

treated by the Legislature as graver and more heinous than that of a person merely called on to preserve the public peace under S. 107 of the Code. The premises are sound but the inference does not follow. In dealing with measures for the prevention of crime the Legislature has to reconcile the conflicting claims of social welfare on the one hand and individual liberty of action on the other. The inquiry is made less formal in proportion to the magnitude of the injury to the public sought to be averted. Individual liberty has to be sacrificed to maintain public tranquility which is of paramount importance to the very existence of the State. Hence the inquiry will follow the less formal mode prescribed for the trial of minor offences (S. 117 of the Code) and the Magistrate is absolved from the duty of recording evidence in full (S. 355 of the Code) because no appeal is provided from his final order binding over a person to keep the peace. On the other hand a good behaviour case has to be enquired into in the same way in which the trial of a warrant case is conducted. The evidence has to be recorded in full (S. 356 of the Code) and from the final order of the Magistrate demanding security for good behaviour a right of appeal is secured by S. 406 of the Code; and all this solicitude on the part of the Legislature would indicate that a case under S. 109 or S. 110 is viewed as less grave in its effects upon society at large than one under S. 107 of the Code. The circumstance that failure to give security for keeping the peace is visited by *simple* imprisonment (123 (5), Cr. P. C.), while in a similar case of bad livelihood the imprisonment provided is rigorous or simple as the court may adjudge in its discretion (125 (6) Cr. P. C.) only illustrates the principle that consciously or unconsciously sentiments and prejudices of our Rulers are allowed to colour the enacted law of this country. In European countries where *duelling* is looked on with great favour and even applauded, the fact that a person is bound over to keep the peace is not considered a circumstance very much to his discredit. It may be one of the factors going to enhance his social importance as is evident from the question very often asked from the Bench "Why should your client object to giving security to keep the peace."

The question may then be asked, what is the use of empowering the police to arrest (Ss. 51, 151, &c. of Cr. P. C.) if on arrest the Magistrate has no option but to release the suspect. Very

often Magistrates demand bail from such persons for their appearance (e. g., ***Raghunandan Pershad*** v. ***Emperor*** [1] and bail is willingly furnished. Is such procedure unauthorised and illegal, if proceedings are ultimately initiated only under S. 109 or S. 110? Having regard to the terms of S. 496, acceptance of bail, when offered, is not improper; but is the Magistrate entitled ***to demand*** bail if he is bound to let the suspect go on his own recognizance on failure to comply with the magisterial demand? The answer in the affirmative of the learned Judges of the Bombay High Court in ***Emperor*** v. ***Ghulam Husain***[2] seems to be based on an insufficient consideration of the wording of S. 496 Cr.P.C. Offences dealt with in Schedule II being grouped as ***bailable*** and ***non-bailable***, a Magistrate has ample power to commit to custody all offenders even in bailable cases where bail is not forthcoming. But the very object of Part IV of the Cr. P. Code is to prevent a man from becoming an offender and as part of a scheme of carrying out this object, the Police are empowered to arrest persons whom they reasonably suspect as likely to become offenders, if not arrested. But at the same time when a person of this class is once arrested he has to be produced forthwith either before a Magistrate or an officer in charge of a Police Station. What the legislature evidently expects is, that the very fact that the authorities look upon him as a suspect and that they have their eyes keenly directed on to him and watching his every movement would tend in a large measure to achieve this primary object, in view, *viz.*, the prevention of crime. And if this be the idea of the legislature, in empowering the police to arrest, one can readily understand why the further sacrifice of individual liberty was thought unnecessary by advisedly refraining from empowering the magistracy to remand the suspect to custody This seems to be the reasonable conclusion on looking at the scheme of the Indian Criminal Law as a whole. The slight departure from this wholesome principle shadowed forth in clause 16 of *the Criminal Procedure Amendment Bill* now on the legislative anvil, by making provision to enable Magistrates to take security in urgent cases before commencing the enquiry under S. 117, is but another instance of the sacrifice of principle by reason of piece-meal legislation.

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1. (1904) I. L. R. 32 C. 80. 2 (1911) 12 Cr. L. J. 533=12 Ind. Cas. 801.

As stated above the primary duty of the Police is to *prevent crime.* It is only when they are found to have failed to discharge this duty, the other faculty of *detection of crime* has to be invoked. The existence of every detective officer in the police force can be accounted for only by the presence of a score or more of his fellow officers unable to discharge their primary duty. If a man is suspected to be a habitual thief or a habitual receiver of stolen property, the police will stand self-condemned if they demand that he should be remanded to custody because they have their suspicions about him. If the law contemplated that every subject may be remanded to custody pending further enquiry as to his good behaviour, the police force may safely be reduced to a few officers richly endowed with the faculty of forming suspicions and there will be no scope for the many that prevent crime and the few that detect crimes when committed.

The conclusion seems to be that the legislature has not sacrificed individual liberty to a greater extent than was deemed absolutely necessary. The Magistracy cannot call for bail from a person against whom proceedings under S. 109 or S. 110 are contemplated or pending, because they are not empowered to remand such persons to custody under any circumstances pending the inquiry. The police no doubt can arrest suspects; but the Magistrate before whom they are produced has no other option but to take the suspect's own recognizance for appearance and if he fails to appear he may be arrested for having committed an offence under S. 174 I. P. C. and remanded to custody, if he is unable to offer bail in regard to that offence. The proposal in clause 16 of the amendment Bill is therefore reactionary in its character and ought to be strenuously opposed before it is allowed to become Law.

S. SWAMINADHAN.

NOTES OF INDIAN CASES.

Krishnadixit v. **Baldixit**, I. L. R. 38 B. 53. Some of the observations in this case on the question of limitation seem to us to be too broadly stated. The plaintiff was leasing out and collecting the rents of certain lands as defendant's agent. About 1893 or 1894, the agent asserted that he was the owner of the lands and thereafter never accounted to the defendants for the

rents collected. The question was, whether that gave rise to an adverse possession on which a prescriptive title could be based. One of the learned judges (*Shah J.*) holds, on the facts, that there was not sufficient repudiation of the agency or overt act on the part of the agent to change the character of the plaintiff's possession from permissive into adverse. The decision might well have rested on this ground. The other learned judge (Heaton J.) however bases his decision on broader grounds (and some remarks in Justice *Shah's* judgment tend in the same direction). It is stated that so long as the land was held under the tenancy, the tenant's possession was that of the defendant and the defendant's rights to the land were absolutely unaffected in any particular by the reiterated assertions made by the plaintiff of an adverse title or by the fact that as the rents were retained ' by the plaintiff. The reason given is that the possession or occupation rather, was with the tenant and the tenant was the tenant of the defendant, that possession legally was with the defendant. We beg leave to doubt the correctness of the propositions so generally stated; and the passage cited from *Secretary of State for India* v. *Krishnamoni Gupta* [1] does not really advance the argument. It is no doubt ordinarily true that the possession of a tenant is the possession of his landlord but if the tenant pays the rent to a person who claims against the landlord, with knowledge of such claim, it is too much to contend that such third person is not in adverse enjoyment as against the landlord. His claim is not answered by saying that unless the landlord chooses to avail himself of the forfeiture, the tenant's possession is not adverse to the landlord (*Cf.* however *Ittappan* v. *Manavikrama* [2] *citing Doed Graves* v. *Wells* [3].) The judgment also assumes that during the period of the tenancy the landlord *could* not have sued for possession. This assumption will not be well founded, at any rate in cases in which the tenant was paying rent to a third party with knowledge that he was claiming adversely to the landlord. Where rent is paid by the tenant to a third person without knowledge of his adverse claim, the question may stand on a different footing, but we are not sure if even in that case the third party cannot claim that his receipt of rents was tantamount to possession (whatever the tenant's belief may be) and if the landlord was aware of his adverse claim, his possession was adverse to the landlord. The

1. (1902) I. L. R 29 C. 518
2. (1897) I. L. R. 21 M at 160.
3. 10 A. & E. 427.

observations in *Lyell* v. *Kennedy* [1] would rather seem to support the view that if the agent could prove that he received the rents in open assertion of a hostile title it would amount to an adverse possession by which a prescriptive title could be acquired. What would suffice to change the agent's receipt of rents into a hostile claim as against the principal is of course a different question : as to which see *Williams* v. *Potts Dadoba* v. *Krishna* [3].

Ramcharan Bajpai *v.* **Rukhal Das Mookerjee**, I.L.R. 41 C. 19; **Bijoychand Mahatab** *v.* **Kalipada chatterjee** I. L.R. 41 C. 57. In these cases the Calcutta High Court had to consider certain interesting questions connected with endowments. One was as to the tenure of the office of "Superintendent" under the particular trust deed, whether his relation to the trustees was that of a *cesti que trust* or of a mere servant. Holding him to be a 'servant' only, the learned judges say, as to the duration of the office, that the power to appoint ordinarily involves a power of dismissal, unless there is anything special in the nature of the office or in the deed or statute under which the appointment is made. It must however be stated that the nature of the exception is such that the application of the rule is oftentimes attended with considerable difficulty. And the learned Judges lastly proceed to apply in terms the ordinary rule obtaining in the law of master and servant and hold that even if the superintendent had been wrongfully dismissed, his remedy was not by way of restitution to his office but only in damages. Apart from the particular case, we beg leave to doubt the correctness of so far assimilating the law on these and cognate matters to the ordinary law of master and servant. In most of our religious institutions there are several offices in respect of which it may not be possible to establish a tenure by custom but yet the notions of old clinging to them have not given place to the modern idea of contractual relationship; and it cannot be denied that the proper test by which to determine the right of dismissal would, in some at least of such instances, be, not the willingness or otherwise of the person appointing, but the interests of the institution.

The second case was of a 'novel' description. One of the questions was as to whether a condition in a grant for the worship

1. (1889) L. R. 14 A. C. 437. 2. (1871) L. R. 12 Eq. 149.
3. (1879) I. L. R. 7 B. 34.

of a particular deity came to an end when the temple was washed away and the image broken. The learned judges relying on the decisions in *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra* [1] hold that an endowment is not affected by the destruction or mutilation of the image, and that, therefore, when another temple was built in the place and a new image set up, the grantee was bound to perform worship in that temple. We are not disposed to question the decision in the particular case. But in the application to such cases of the general principles laid down in the Full Bench Judgments in *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra* certain difficulties are likely to arise which it is well worth bearing in mind. Suppose in this case, the new temple had been built and the new image set up by somebody other than the original donor or the new image had been given a different name or the temple built in a neighbouring village; we venture to doubt if the decision would have been the same. One may take the liberty of suggesting that when the endowment is applied for the worship of the new image, it is an application *cypres* rather than the continuation of the original trust and this will involve some difference in logical consequences.

The Assistant Sessions Judge of N. Arcot v. Ramasawmi Asari, 26 M. L. J. 235. The complainant, in this case, entrusted certain jewels to the accused at Vellore to be sold on commission. The latter took the jewels, pledged some of them at Bangalore for his own use and misappropriated the rest at Madras. He was charged before the Sub-Divisional Magistrate of Tiruvannamalai with criminal breach of trust and criminal misappropriation. On a question of jurisdiction being raised, their Lordships have held that the Magistrate had jurisdiction under S. 179 of the Criminal Procedure Code as the loss to the complainant occurred at Vellore and it is a "consequence" within the meaning of the section. This reasoning seems open to question. S. 179 Cr. P. Code contemplates an offence by reason of anything done *and* of any consequence which has ensued, so that both the act and the consequence are necessary ingredients in the offence. The section would seem to be applicable to continuing offences or offences which, by reason of aggravation, become a different offence. Illustration (*d*) to the

1. (1909) 10 C. L. J. 355 S. C. I. L. R. 37 C. 128 (F. B.)

section, on which their Lordships rely, shows that the wound was caused in Baroda, the consequence, namely, death, ensued at poona and therefore the offence of causing A's *death* is triable in the latter place. The other illustrations too, do not extend to the case of an offence complete by the act itself without any reference to the consequences. In the case under consideration, the act of dishonest misappropriation or criminal breach of trust occurred at Bangalore and the offence having become complete, the fact of subseqnent redemption or accounting for it at Vellore, will not affect the question. See explanation to S. 403 I. P. C. Again, their Lordships hold that the loss occurred at Vellore; if the complainant shifted to some other place, could it be said that he suffered no loss ? The wrongful gain to the accused occured at Bangalore and that is enough. It is clear therefore that the loss or the gain occurred at Bangalore and not at Vellore. If neither the act nor the consequence occurred at Vellore, the section does not give jurisdiction to the Magistrate. Their Lordships' judgment can however be supported under S. 181 cl. (2) which specially provides for the offence of criminal misappropriaton and criminal breach of trust, on the ground that the jewels were *received* at Vellore. Though their Lordships refer to S. 181 cl (2), attention was not drawn to the fact that the legislature could not have provided two sections if really the above offences are governed by S. 179. Two Allahabad cases are referred to *Langridge* v. *Atkins*[1] and *Q.* v. *O'Brier* [2] the first of these supports the view taken by their Lordships, but the earlier case proceeds to interpret S. 179 in a different way. According to *Q.* v. *O'Brier* [2] though the offence becomes complete by the act itself, if the consequence ensues at another place, S. 179 is applicable. This is not the view taken in the later cases.

Regarding the applicability of S. 188 of the Criminal Proceedure Code, their Lordships rightly hold that if the offence can be enquired into, under any one of sections 179 to 184, the fact that sec. 188 is intended to provide for offences committed beyond British India does not deprive the courts in British India of the jurisdiction given to them under the earlier sections.

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1. I.L.R. 35 All. 29. 2. 19 I.L.R. All. 111.

SUMMARY OF ENGLISH CASES.

Whiteley *v.* Delaney: (1913) A. C. 132.

Subrogation—Mortgage—Merger—Payment of prior Mortgage—Ignorance as to Existence of subsequent Mortgage—Effect of—Rectification—Circumstances Entitling pleadable in defence.

In this case, the Lower Courts had much canvassed the extent to which *Toulmien* v. *Steere*[1] remains good law. Their Lordships' view of the facts made it unnecessary for their Lordships to express an opinion on the matter. Their Lordships seemed to be clear that the doctrine of *Toulmin* v. *Steere*[1] should not be extended.

There were two mortgages on a land. The mortgagor being pressed by the first mortgagee agreed to sell the property to his daughter and she asked a solicitor to find somebody to advance funds to her to enable her to pay the 1st mortgagee. The solicitor introduced one Farrar who agreed to advance the money on the understanding that with it the mortgage was to be discharged and he should be given a first mortgage on the land. The transaction was carried out by a re-conveyance by the mortgagee, a sale by the mortgagor and a mortgage by the vendee in favour of Farrar. All the parties except the mortgagor were unaware of the 2nd mortgage.

Such being the facts their Lordships held that the 2nd mortgagee was not entitled to claim priority as against Farrar. Their Lordships put it this way. Either it was a case of mutual mistake or it was a case of fraud. The intention of the parties to the transaction being that Farrar should have a first mortgage he was entitled to have the deeds rectified so as to give him that right against the second mortgagee who was, in respect of the priority claimed only a volunteer. It was not necessary that a suit should be brought for rectification. The circumstances entitling rectification might be pleaded as a defence to a suit brought upon the footing of the unrectified deed. This was putting it as a case of mutual mistake. Putting it on the footing of fraud, the second mortgagee being a volunteer would not be allowed to take advantage of the fraud of the mortgagor through whom for this purpose he must be taken to claim.

1. (1817) 3 Mer. 210.

The Lord Chancellor was of opinion that if the question was only whether there was an intention to merge, there was a merger in this case on the wording of the deeds.

Lord Dunedin states the effect of cases on merger thus. "Where by appropriate conveyancing the charge could be preserved, then it will be for the party alleging the charge to be dead to show an intention to that effect. What have been called the presumptions arising from the continued existence of the charge being to the benefit of the person who has paid it off as *e.g.*, in the case of a limited owner are just I think other ways of expressing the same rule." In that application of the rule to the facts of this case, his Lordship thought that the question depended on whether the true payer of the charge was Farrar or the mortgagor.

(1912) 1 Ch. 735 reversed.

Attorney General for the Province of British Columbia v. Attorney General for the Dominion of Canada: (1914 A. C. 153).

Fishery right—Nature of—appurtenant to the Solum—Severance by grant or prescription—Not by custom—Public Right of navigation and fishery—Analogous—Ownership of shore for 3 miles—Question of international law.

In the course of this decision, their Lordships of the Privy Council make certain important observations as regards fishing rights and the crown rights to the bed of the sea within 3 miles of the shore.

The general principle is that fisheries are in their nature mere profits of the soil over which the water flows and that the title to a fishery arises from the right to the solum. A fishery may of course be severed from the solum and it then becomes a *profit a prendre* in alieno solo and an incorporeal hereditament. The severance may be effected by grant or by prescription but cannot be brought about by custom for the origin of the custom would be an unlawful act.

The authorities treat this broad principle as being of general application and not restricted to inland or nontidal waters. It applies equally to tidal and nontidal waters, whether the owner

be the Crown or a private individual. In the case of tidal waters the exclusive character of the title is qualified by another and paramount title which is *prima facie* in the public. The subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike. The legal character of this right is not easy to define. It is probably a right enjoyed so far as the high seas are concerned by common practice from time immemorial and it was probably in very early times extended by the subject without challenge to the foreshore and tidal waters which were continuous with the ocean. The right into which this practice has crystallized resembles in several respects the right to navigate the seas or the right to use navigable river as a highway and its origin is not more obscure than that of these rights of navigation. Finding its subjects exercising this right from immemorial antiquity, the Crown as parens patriae no doubt regarded itself bound to protect the subject in exercising it and the origin of the right as legally cognisable is probably attributable to that protection, a protection which gradually came to be recognised as establishing a legal right enforceable in the Courts. This right cannot be restricted except by the Legislature. The right of the public to fish in the sea does not rest upon the crown's right to the soil.

Their Lordships say with reference to the ownership of the crown to the bed of the sea within the three miles limit that the question is one of International Law and the conflict of judicial opinion which arose in *Reg* v. *Keyn* [1] is not likely to be settled till the subject is examined at a conference of the powers. Till such a conference takes place the question whether the shore for three miles of the coast forms part of the territory of the Crown or is merely subject to special powers necessary for protective and police purposes must remain a doubtful one.

In re **Blow : St. Bartholomew's Hospital (Governors) v. Camden,** 1914 I. Ch. p. 254 (C. A.)

Statute of Limitations—Trustee Act, S.1, Sub. S.(3), S-8, Sub.S.(1) Cl. (a) and (b)—Administration—Creditor's action—Devastavit—Distribution of the testator's assets more than six years before the action—Liability of the executors of an executor—Covenants in a lease binding on the testator.

1. (1876) 2 Ex. D. 63.

A testator died in January 1902, bequeathing a leasehold interest in some poperties to his wife for life and after her death to his children. In October 1902, the two executors distributed the lease hold interest to the beneficiaries without making any other provision for the liability under the covenants of the lease than an indemnity from the beneficiaries. The rents due under the lease were paid properly till 1909. One of the executors died in 1906. In 1911 the present creditor's administration action was brought on the covenants in the lease against the surviving executor, the beneficiaries and the executors of the deceased executor. The executors of the deceased executor pleaded S. 8 of the Trustee Act, by which a trustee who commits a breach of trust *bona fide* is enabled to take advantage of the Statute of Limitations, in defence. Under S. 1 of the Act, the term "trustee" was made to include "executors," *Held*, by the Court of Appeal (Cozens-Hardy M. R. and Swinfen Eady L. J., Phillimore L. J. dissenting) that though the action was a common creditors action, the executors of the executor were entitled to the protection of S. 8, (1) (*b*) and lapse of time after 1902 was a defence.

Per *Swinfen Eady L.J.* There is no difference under the section between the creditor's administration action and an action by a beneficiary; a devastavit more than six years prior to the action can be pleaded by the executor.

Per Phillimore, L.J.—The action could be brought only after the default in payment of rent; and the action in 1911 was within time and the executors of the executor, were liable as they could plead limitation only as in an action for money had and received.

***In re* Pearce Alliance Assurance Company Limited v. Francis**, 1914. 1 Ch. p. 254 (C.A.)

Will—Construction—"Children"—Whether includes illegitimate children and when.

A testatrix by her will gave the residue of her property to her brother during his life-time; and after his death in trust "for all or any of the children or child" of the brother etc.

It was found that the brother had six children by a woman whom he had not married but to whom he was reputed to be married, and two children by his wife whom he married after the

death of that woman; and that the testatrix believed all the eight children to be his legitimate issue the first six by his first wife and the other two by his second wife. *Held* that under the gift only the two legitimate children took the residue. The only two cases where the term "children" can be construed to take in illegitimate children are (1) where the testator has made a dictionary of his own for the constuction of his will (2) where it is impossible from the circumstances to give any meaning to the term without taking it to mean illegitimate children.

Hill v. *Crook* [1], *Dorin* v. *Dorin* [2] followed.

In re **Major: Taylor** *v.* **Major** 1914 1 Ch. p. 278.

Will—General charge of debts including mortgage debts—Specific devise—Of incumbered and unincumbered realty—Later clause creating a trust of the residue for conversion and payment of debts including mortgage debts—Locke King's Act.

A testator by his will stated " First I will that all my just debts including mortgage and funeral and testamentary expenses be paid and satisfied." Then he made a specific bequest to one of his sons; and afterwards a specific devise of incumbered and unincumbered realty to his several children. Of the residue of the realty and personalty he made a trust for conversion and payment of his lawful debts including mortgage-debts.

Held, on originating summons,

(1) That the real and personal estate comprised in the express trust for payment of debts should so far as it extends be applied rateably in the payment of all the debts, mortgage-debts and otherwise of the testater.

(2) That the initial general charge for the payment of debts was explained and specified by the creation of trust over specific property in the end.

(3) That each of the mortgaged properties should bear the proportion of the mortgage debt not discharged by the specific fund.

(4) That the other debts and funeral and testamentary expenses should be borne rateably by the specific legacy and the pro-

1. L. R. 6 H. L. p. 264. 2. L. R. 7 H. L. p. 560.

perties specifically devised, the share which the latter have to contribute being their value less the proportion of mortgage debt on each not discharged by the specific fund.

Bebb v. Law Society, 1914 1 Ch. p. 286 (C. A.)

Solicitor—Admission of women—Disqualification,—Usage,—Solicitors Act, 1843 s. 48.

Women cannot be admitted by the Law Society for the preliminary examination with a view to becoming solicitors. The interpretation clause in S. 48 which provides that words importing the masculine gender shall include a female has not the effect of removing the pre-existing disability of women acting as solicitors. Women are under the common law under a disability to become solicitors or attorneys. There has also been that long uniform and uninterrupted usage which is the foundation of the greater part of the common law.

In re **Working Urban District Council (Basingstoke Canal)** Act 1911; 1914 1 Ch. p. 300 (C.A).

Corporation, for carrying out a public undertaking, Meaning of "successors and assigns"—Dissolution — Assignment—Statute of Limitation,—Statutory obligations—Marginal notes in private Acts of Parliament.

The terms "successors and assigns" used after a company created by statute for carrying out a public undertaking, such as a canal, are unmeaning and are no more than a surplusage. Such a company cannot assign its undertaking to another company without the latter being recognised as an assignee by an Act of Parliament. Where however, a liquidator of the former company sold the canal, with the sanction of court to some persons and the company is dissolved and the persons are in enjoyment of the canal for more than the statutory period, they get a right to the canal; but the obligations attaching to the original company by statute creating the original company do not attach to them. Where subsequently an Act of Parliament is passed by which a local body is authorised to make repairs to some bridges on the canal and recover the expenses for the same from the company, *Held,* the company having ceased to exist, the local body cannot recover the costs of the repairs and the costs of this Act from the persons so enjoying the canal.

Semble. Per Phillimore J.—In some Private Acts of Parliament marginal notes form part of the Acts themselves, where the marginal notes are mentioned as already existing and published by the Parliament, the general rule with regard to marginal notes in Public General Acts being based on their insertion neither by the Parliament nor under its authority.

JOTTINGS AND CUTTINGS

Judicial Joking.—The Court is very much obliged to any learned gentleman who beguiles the tedium of a legal argument with a little honest hilarity,' Chief Justice Erle told a member of the Bar who apologised for a sally that set the Court in a roar of laughter. To judge from the protests which are being made against judicial humour, there are persons who regard even a 'little honest hilarity' as something quite alien to the serious work of the Courts. They would not object to a flash of wit from the witness box; they might even tolerate a witticism from the Bar; but they appear to think that the dignity of the Bench requires that a judge, no matter how mirthful or tedious the proceedings over which he presides, should sit all day 'like his grandsire cut in alabaster.' Judicial joking may, no doubt, sometimes be carried to excess. An incident in the judicial career of Sir James Fitzjames Stephen—by no means, in the ordinary sense, a 'judicial humorist'—indicates its dangers. He was trying a slander case in which both the parties were Billingsgate salesmen and the counsel for the defendant did not fail to take full advantage of the humour of the situation. Mr. H. F. Dickens, who represented the plaintiff, seeing the judge, as well as the rest of the Court, impressed by the jocular aspects of the case, made a strong effort to bring out the serious injury that had been inflicted upon his client. Mr. Justice Stephen, his sense of fairness aroused was sobered in a moment, and summed up in favour of the plaintiff. After the jury had returned their verdict the learned judge sent this note to the plaintiff's counsel: 'Dear Dickens,—I am very grateful to you for preventing me from doing a great act of injustice.' Perhaps some judges would display a better regard not only for their reputation as wits but also for the dignity of the Bench if their attempts at jocularity were rather less frequent. For laughter, though it certainly need not be

banished from the courts, may sometimes create an atmosphere in which the serious character of the work is prejudiced. A 'little honest hilarity' in a court of justice is one thing; an habitual striving after the mirth-provoking is quite another. *Law Journal 21st February* 1914.

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Judges and their Pensions.—A novel suggestion is made by Sir Henry Gibson in the report he has issued as Comptroller and Auditor-General on the Consolidated Fund Account for the past financial year. His eagle eye has detected the granting of an annuity of 500*l* to a County Court Judge who was compelled by ill-health to retire within five months of his appointment. Noticing that the County Courts Act, 1888, prescribes the appointment of 'fit persons' as County Court judges—an expression which, had he been more familiar with judicial matters he would have known referred to professional capacity rather than to physical condition—Sir Henry Gibson was prompted to inquire whether any steps are taken to ascertain that nominated judges are healthy as well as learned. The Lord Chancellor, whose reply appears to have been confined to the case of the County Court Judge in question, stated that his 'position at the time of his appointment, as regards both his practice at the Bar and his state of health, was well known to everyone in the profession, and no exception could have been taken to his qualifications.' Every member of the profession who is acquainted with the County Court Judge referred to—and his identity may so easily be established that it is unnecessary to mention his name—will fully concur in the Lord Chancellor's tribute to his high qualities. But this reply does not appear to have satisfied Sir Henry Gibson, who deems it desirable to add;

> I am, however, not informed whether any system or regulation exists for securing in judicial as in other public appointments that the persons appointed have the necessary physical fitness, failing which they come prematurely on a pension list, which, unlike the ordinary civil pension list, is not statutorily safeguarded by any requirement of a minimum period of public service or by graduation of pension according to length of tenure of office,

Are we to understand that this vigilant guardian of the public purse entertains the view that judges—High Court as well as Country Court judges—ought to be required to undergo a medical examination before they are permitted to start upon their

judicial duties? We refuse to believe that the public would like to see the Bench reduced to the level of the Civil Service in this or any other matter. A member of the Bar who is capable of bearing the responsibilities of judicial office can surely be trusted not to undertake them if he knows that he is not physically fit for the work. The observations of the Comptroller and Auditor-General might have been justified if the instances of early retirement from judicial offices had been numerous. As a matter of fact, they are very few. Sir Arthur Jelf retired from the Kings Bench Division within nine years of his appointment, and Sir Henry Sutton after less than five years' service; while Judge Hans Hamilton and the late Judge Cyril Dodd, K. C., retired from the Country Court Bench after serving for six years. These are the only recent instances we can recall of premature retirement from the High Court and the County Court, and not one of them, either in the circumstances of the appointment or in the length of the service, lends any weight to the strange suggestion that judges ought to be medically examined before they take their seats on the *Bench—Ibid.*

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Costs in Alternative Claims:—Where a plaintiff is in doubt as to the person from whom he is entitled to redress he is permitted by the Rules (Order XVI., r. 7) to join two or more defendants, so that the question as to which of them is liable may be determined at the trial. And, although there are obvious risks in this process, the tendency of the Courts in recent years has been to visit the defendant who is found to be actually in the wrong with the whole costs of the proceedings. In *Vine* v. *National Motor Car Co. and L. G. O. Co.*, a year ago, Mr. Justice Bucknill made such an order against the first defendant, who had simply repudiated liability but were found to be the parties really responsible, being of opinion that such a repudiation was not sufficient, but that they 'should have said something' which would have been a guide to the plaintiff, with his limited knowledge of the facts, as to whether he ought to join the other defendants or not. A further extension of the principle was made by Mr. Justice Bankes last July in another action by a Mr. Mulhern against the same two defendants, in which the omnibus company, being first applied to, had followed the course suggested by the earlier decision, but

the learned Judge thought that the rule should apply equally to the second party attacked. In his opinion, it was necessary for any defendant who desired to escape the obligation to pay the costs of an alternative defendant to do something more than merely deny negligence on his own part; he must go as far as to say that he did not throw any responsibility on the other party. We commented on these decisions at the time (48 LAW JOURNAL, pp. 119 & 450), suggesting doubts on these rulings, and now the Court of Appeal has held (in ***Bestermann*** v. ***British Motor Car Co. and the L. G. O. Co.***, February 13) that there are no such duties on the part of co-defendants, and that the rules as stated could not be supported. The main authority for the imposition of this new liability on co-defendants is, of course, *Bullock* v. *London General Omnibus Co.* (1907), and the test there laid down by the Master of the Rolls for deciding whether an unsuccessful defendant should bear the costs payable to a successful one was, whether in the circumstances of the case it had been reasonable for the plaintiff to join both defendants. That the Court has now declared to be the only proper test, and no attempts to define the obligations of parties charged as co-defendants will meet the case so well as this. In the particular case the Lords Justices rejected the contention that, unless it appeared that the unsuccessful defendants had misled the plaintiff into joining the successful one, it could not, for this purpose, have been reasonable for the plaintiff to join them both. And, as the cases now stand, the procedure depends, not on the observance of any particular condition by the defendants, but on the 'reasonableness' of the plaintiff's action in joining both defendants. That may be very vague, but it is better, perhaps, than any fixed statement of conditions which then would be easy for a defendant to evade at the expense, of the injured person.—*Ibid.*

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The Public Influence of Lawyers.—Lord Haldane, in the interesting speech he delivered at the City of London Solicitors' Company's banquet, remarked that 'lawyers were the leaders of public opinion in this country' and that 'they had it in their hands to make or mar much of the future.' Never was the truth of these words demonstrated more strikingly than in the Home

Rule crisis. All the three chief protagonists in the Irish question—Mr. Asquith, Sir Edward Carson, and Mr. John Redmond —are members of the Bar. To these three men, trained in a profession—which, whatever the ignorant may believe, is accustomed to strive for peace rather than to delight in war, the nation is looking anxiously for a peaceful settlement of the Ulster problem, and upon them all will rest a very heavy responsibility if, because of any inadequate regard for that spirit of compromise which so often secures the triumph of justice in the courts, they fail to agree upon some reasonable plan by which the threatened dangers, on one side or the other, may be avoided. *Law Journal 28th February*, 1914.

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The Jurisdiction of the Privy Council.—The aptness of the Judicial Committee of the Privy Council for determining the complicated and grave constitutional and Imperial questions which are continually arising in one or other part of the British Empire is signally marked in the developments of the last few years. That august body has been called upon to pronounce on the validily of a proposed Canadian marriage law, on the legality of the retention of a seat in the House of Commons by a member of a firm acting for a Government department, on the true boundary between the States of the Australian Commonwealth. and on the powers of a Canadian Provincial legislature over the waters which bound the coast of the colony. All these questions have been brought before it by a somewhat extraordinary procedure, under which vexed problems of a quasi-legal character can be referred to His Majesty's Council; and it is in virtue of this residuary jurisdiction that the Crown is about to submit to it the question of the ownership of certain lands in Southern Rhodesia which are claimed by the Chartered South Africa Company Section 4 of the Act of William IV. (1834), which established the Judicial Committee, provided that His Majesty might refer to the Committee, in addition to any appeals coming from Courts of Justice in the Empire, 'any such other matters whatsoever as His Majesty may think fit, and the Committee shall thereupon hear or consider the same, and shall advise His Majesty thereon.' There can be little doubt that the decisions of the martial law tribunals in South Africa could be referred to the same process of revision, if the Sovereign so desired. They

are not deemed to be regular judgments in courts of law, so as to be subject to appeal to the Privy Council exercising its ordinary jurisdiction; but they are within the class of matters which have been the object of special reference. In the case of *Attorney-General* v. *Tilnoko* [1907] in somewhat similar circumstances the Judicial Committee refused to revise a sentence of a martial court. But, though it may not be expedient to resort in every doubtful case of gravity to the ultimate judicial authority in the Empire, the power of reference is a potent instrument for securing an Imperial equity, which may in time develop into a special form of British federal law.—*Ibid.*

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The Legal Profession : *Lord Reading*, who received an ovation on rising to respond on behalf of the Bench, at said that never before, looking down the table in the hall, had so many memories crowded upon him, so many causes come back to his mind which he thought he had forgotten, so many consultations, so many speeches. (Laughter.) They would forgive him, he was sure, if, in responding to the toast, he made the personal observation that he had always felt such success as he might have achieved had been in a very large measure indeed due to the support which he was fortunate enough to receive from the solicitors of the City of London. It was rarely, perhaps, that one was entitled to indulge in autobiographical reminiscences, but he could well recollect the time when he used to do work in his early days in courts far removed from the City, when he sighed for the moment to come, and seemed to sigh in vain, when he should appear in what was called a City case. No one was able to explain how the change came, but it did come to men at the Bar, and it was from the moment that he found himself recognised by the City solicitors that he began to climb the ladder. (Cheers.) He was not yet used to responding for the Bench—(Laughter)—he was always much more inclined to think of the Bar—for he was but a few months old as a judge. He had his reputation to make, he had his way to make, amongst the profession and the public. But, speaking as the representative of the judges, he desired to thank them for the kind and just allusions that had been made to his distinguished predecessor. (Cheers.) Lord Alverstone was one of his early friends at the Bar. It would always be remembered as one of his characteris-

tics that he was ever ready to hold out the hand of good fellowship and to give encouragement to any young man whom he thought to be deserving. (Hear, hear.) He should see Lord Alverstone within a very few days, and would convey to him their greetings, and they would be glad to know that his health had improved. (Cheers.) He would only mention one little incident concerning Sir Thomas Bucknil—(cheers)—to indicate his public spirit and his high-minded desire to serve the State. It was no secret now that he intended to resign at the beginning of the year. He (the Lord Chief Justice) asked him after consulting the Lord Chancellor, to remain on for a little while, as arrangements were being made for the Court of Appeal which would take away some of the judges from the King's Bench Division. He had made arrangements to go away, not expecting the ill-health which, unfortunately, had stricken him just lately, but he said that as long as he was wanted and it was for the public good he would remain. (Cheers.) He thought he was entitled to say that at the present moment the judges stood high in the esteem not only of the City but of the public, and that they would bear comparison with the judges of any land. It was, after all, only a platitude to say that they were animated by the highest desire for the public good. He was sure that all those present, who had knowledge of the judges would appreciate that, but he as a new judge was able, perhaps to look at the subject from a fresher standpoint than his colleagues on the Bench. Every day that he took his seat on the Bench he felt the heavy responsibility of the position which he occupied and he was certain that all his brother judges had the same view, even though they might have served for many years. No one could sit in court having to determine cases upon the facts and the law without realising that a great burden was put upon him. His decision affected the welfare, it might be the fortunes, and sometimes the character of one of the litigants, and possibly of both. It was, therefore, of the utmost importance, in his judgment, that case that were brought before the courts should never be hurried. (Cheers.) The longer he sat on the Bench the more he was convinced that the greatest quality of a judge, leaving aside for the moment his capacity to deal with the law or the facts, was that of patience. He was impressed by the the necessity for quiet, careful, patient. deliberate hearing of all

that there was to hear, so that the parties might go away absolutely convinced that the decision was given according to the best ability, wisdom, and judgment of the judge. (Cheers.) At the present moment one no longer heard of arrears in the courts. They existed in the past, and they might possibly come again in the future, although he was a little inclined to doubt it. One thing that had impressed him during his occupancy of the Bench was the desire of the judges to meet any possible objection that there might be to the present system and to initiate reform wherever it was needed. It was quite a mistake to think that the judges were oposed to reform. On the contrary, they had a great deal of experience, and could very usefully co-operate in bringing about reform wherever they thought it was necessary, (Cheers.) Above everything, they as judges rested upon the assistance which they got both from the Bar and from solicitors, and it was to that harmonious co-operation, which had existed so long in this country; that they had to look. He had once been a Minister of the Crown, and Lord Haldane would forgive him if he said that to the public in general.the everyday life in the courts, the daily decision of causes, the pure and impartial administration of justice, was as important as that the country should have great Ministers. (Cheers).

Sir Robert Finlay, who responded on behalf of the Bar, said that the profession of the law more than any other profession was brought every day into contact with every feature of national life. This was particularly true of the Bar, which had in one of the tribunals before which it practised a still wider outlook. Before the Judicial Committee of the Privy Council the members ol the English Bar were brought into intimate relation with every part of the greatness of the Empire that the world had ever seen. (Cheers.) It was a wonderful tribunal, and anyone who wanted to realise the greatness of the Empire might well spend a few weeks there listening to cases from India, America, Africa, and all our dependencies. He would learn that every part of the Empire recognised that it was a tribunal to which it might appeal with a perfect certainty that justice would be done. It was one of the greatest assets of an Empire (Cheers). There was one institution which he hoped the profession would, never part with, and that was the long Vacation. (Laughter and cheers.) He had always envied the Scottish

Courts their vacations of six weeks in Spring—(laughter)—and he respectfullv suggested for the consideration of the exalted persons present the adoption of such a reasonable and modest reform in England—without prejudice to the Long Vacation in the Autumn. (Laughter). *Ibid*

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The Appellate Courts.—Appellants are fairly successful, in the Appellate Courts. Fifty of the 132 decisions reviewed by the Judicial Committee in 1912 were reversed or varied. In the House of Lords the percentage of success was somewhat lower; only 19 of the 59 appeals heard were allowed. But in the Court of Appeal, while 327 judgments or orders were affirmed, 263 were reversed or varied. *Law Journal March,* 14.

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Case Law: *Lord Bryce* Speaking at the Law Society's Hall said that Case law had often incurred reproaches from those who preferred the more abstract kind of law which was taught in Continental schools, but he believed there was a great deal to be said for our system from the point of view of thestudent,because in studying cases he was always kept in close touch with facts, and he learned from cases what was the relation between fact and law, and how facts ought to be studied. It had often been said that the law of England was wanting in symmetry, that it was very difficult to learn, and that a man got bewildered amongst the mass of cases, but it had always maintained the old quality of the Common Law of being in touch with the common people. The law should always keep pace with changes in social and economical questions. It ought always to be just a little behind the top of the wave of public opinion. It should never follow public opinion too fast, because public opinion must change; and he thought it might be said of our own time that the law was at least keeping abreast of what the public opinion of the day required. He did not think there was any profession in which a man could in the course of his professional work contribute so largely to the good of the community as could the lawyer. *Ibid.*

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'*The Bayard of the Bar.*' *Sir Edward Clarke,* who within the next few months will complete his fiftieth year at the Bar, has announced that he intends to mark the occasion by retiring

from practice. It is a professional career of rare merit and distinction which will thus be brought to a close, and it will occupy a high place in the annals of the English Bar not only because of the great forensic gifts, the robust and penetrating intellect, the polished eloquence and the chivalrous sense of fairness which Sir Edward Clarke has always brought to his work as an advocate, but also because of the courage and independence which he has conspicuously displayed in the wider field of public life. This is not the occasion on which to review minutely the high qualities of mind and character by which ' the Bayard of the Bar, ' as Sir James Mathew once called him, has achieved his brilliant record as one of the greatest advocates of modern times. The Bar, for which he has an affection that is amply returned, may be trusted to organise some fitting tribute to him when the time of his retirement comes. We would only now express the hope that the public recognition of his long and distinguished career will take a form which will enable him—for he wears his seventy-three years lightly—to give the country the benefit of his learning and experience in the supreme tribunal of the Empire.—*Ibid March*, 21.

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Miscellany. Sir John Simon, speaking at the annual dinner of the Manchester Law Students' Society on March 13, referred, in a humorous speech, to the relations of the law to the general community. To the novelists, the dramatists, and other uninstructed critics, lawyers were men of diabolical acuteness who spent their time saying what they did not believe in order that they might make the worse appear the better reason for purposes entirely disgraceful and for remuneration invariably extortionate. The fact was, however, that lawyers were painstaking and industrious people, who spent more time in reconciling differences than in fomenting strife, who endured much unmerited obloquy, and without whom no Government was complete. There had never been a time in the history of this or any other country when, in a great crisis affecting constitutional liberty, the lawyer had not taken a great and striking part. A lawyer who found that the facts and arguments were against him would settle and compromise, and those were the real qualities of statesmanship. *Ibid*.

Procedure for the Ascertainment of Truth v. The "Sporting Theory of Justice."

A spirited attack on our contentious system of procedure, with all the rules of professional conduct which have grown up under it, the more notable because it came from a recognised leader of the bar, was made by Sherman L. Whipple of Boston, on Feb., 2, at the meeting of the Connecticut Bar Association.

Mr. Whipple's views were expressed in his address on "The Impairment of Popular Confidence in the Administration of Justice", at New London. Mr. Whipple arraigned the existing system, which he described as farcical and a relic of Middle Ages. The secrecies, suppression of the truth, and surprises in Court employed by Counsel, he said, must be eliminated.

"A trial in Court must be made to be a judicial investigation in which attorneys participate as officers of the Court, whose primary duty shall be that the truth shall be disclosed."

"I believe that the entire theory and method of our Court trials must be radically and fundamentally changed.

"The conception of a trial which dominates our present procedure is an inheritance from the Dark Ages.

"Our ancestors originated a forum which should become a substitute in the settlement of controversies of the prevailing forum of personal encounter. They sought to substitute intellectual skill and agility for fisticuffs and weapons. In this twentieth century the substitution has become almost complete, though to our regret and shame fisticuffs and weapons are still sometimes in evidence in the trial of causes.

"Most of the other characteristics of barbaric contest—concealments, secrecy, ambuscades, surprises and other tricks of the game, are still with us. The grand strategy, as the game is played, is suddenly to surprise one's opponent with an unexpected witness, or claim, or ancient rule, and in the opponent's confusion and consternation run away with the verdict. The judge under the rules is a rather helpless reference, the lawyers the intellectual gamesters, the verdict or judgment the stake or prize of the contest.

"It is a time honoured maxim oft he law that secrecy is the badge of fraud; yet, from the moment when the client first consults his attorney and learns that he may safely confide in him

any guilty secret; secrecy is the prevailing characteristic of the entire conduct of the case. Client and witnesses alike are enjoined to silence, and throughout the trial, the attorneys sit discreetly withholding all disclosure. The whole atmosphere of the trial steams with discreet reserve and furtive concealment.

I repeat my belief that the instincts of the people are right. The machinery of our courts does not with unerring accuracy result in justice. It does not disclose and is not, as it should be, adapted to disclose the truth which is essential to justice. The system is a burden; it is archaic; it is outworn; it is unadapted to the standard of modern civilization.

" It is not to be wondered at that in their intense disgust and dissatisfaction at the court's performances, the people turn their thoughts to extravagant and unwise remedies.

" In the first place the central theory and purpose of any new system of procedure must be the unerring and speedy ascertainment of the truth. "

Mr. Whipple outlined his views on the new procedure, as follows:—

(1) " The characteristics of the game—the secrecy, the surprises, the ambuscades—must be eliminated.

(2) A trial in court must be made to be a judicial investigation, in which attorneys participate as officers of the court, whose primary duty shall be that truth shall be disclosed.

(3) " Any existing rule, or privilege, or law which tends to prevent the disclosure of the truth must go.

(4) " Absolute disclosure must be compelled on the part of every person within the reach of the court who has knowledge of material facts.

(5) " Every right or privilege must be subordinated to disclosure of the truth.

(6) " It must no longer be a duty of an attorney to help a client to conceal any fact which justice requires to be disclosed.

(7) Both parties, in advance of trial, must disclose the names and addresses of witnesses who have been interviewed with statements of what has been said at such interviews.

(8) " Instead of a formal declaration or complaint and instead of a formal answer, plaintiff and defendant shall recite all the facts and evidence in their possession.

(9) " The rules of evidence should be rationalized. Testimony now excluded because it is hearsay or otherwise should be admitted if it is evidence which would convince men in forming their judgments in human affairs.

(10) " The rule denying the right of a party to litigation to testify should be eliminated.

(11) " When the jury have reached a decision after being aided all that is possible by judge and counsel, the decision should be final.

" I think that there is a rational basis and reason for the popular feeling of dissatisfaction with the performance of our courts," said Mr. Whipple. "I believe that the courts really deserve the loss of popular confidence which they have suffered. I do not believe that the judges deserve the criticisms which are applied to them, and I do not believe that our profession is deserving of that measure of distrust which it now suffers."

These proposals drew a reply from Professor Taft at the banquet of the Boston University Law School Association on Feb. 5. He said

" If Mr. Whipple's ideas prevailed in the profession that we are in, with our confidential relations to our clients, it would take about a week to dispense with the services of the profession and certainly, if they were to prevail, the profession ought to go out of business.

" Why, we are not keeping the secrets of our clients. We are talking over secrets and advising wisely with respect to those things that if we were not engaged in the profession would be retained and not even be made the basis of good advice.

" One of Mr. Whipple's propositions was that we were going to abolish the rule relating to hearsay evidence. I was eleven years on the bench and it did seem to me that if there was one rule governing the trial of cases in the admission of evidence that tended to the sifting of truth it was the rule that excluded hearsay evidence and subjecting every witness to cross-examination.

" I don't know whether you can remember the shock that went over this country when the Dreyfus case was tried in Paris, and when they called witness after witness, who stood up and

swore that from the things they had heard they believed that Dreyfus was guilty. And that is the kind of evidence we are going to have in order to help the court rooms and to purge the profession of the little devils that are running under the tables in the court rooms.

" But the reputation of Massachusett' justice and the dispatch of that justice as compared with that in other states is not going to suffer by such an ill-advised statement in respect to it as has come from Mr. Whipple."

On the following day Mr. Taft referred to the subject again in the second lecture in his course at Boston University Law School on "Legal Ethics." He considered that "to require the disclosure of the confidential relations of counsel and client would destroy this profession. If a lawyer were forced to make disclosures it would destroy the duty of a lawyer to society in effecting compromises and in the avoidance of suits. How many persons would hire a lawyer if they regarded lawyers as detectives to investigate their case and then report the weak points to the Court? There are at present methods compelling each party to testify and the Courts and parties can now get all the facts. Clients should be able to talk with their counsel without the fear of a disclosure. Take away this protection and you altogether destroy the value or usefulness of our profession.

" Mr. Whipple's objection to hearsay evidence also is unfounded. The rules of evidence have been worked out after centuries of experience in Court, and instead of losing their force they are gaining all the time.

" There may be some changes needed in the system of evidence. I sometimes doubt whether the constitutional provision that 'no man shall be forced to be witness against himself' is a reasonable restriction as to the detection of crime. Society is entitled to protection. The first thing we do when a wrong is committed is to ask the person suspected. This is the rule the mother applies to the boy when she finds the jam pot violated."

Mr. Whipple, when shown a report of Mr. Taft's second lecture, made reply as follows :—

" While I respect Mr Taft's opinion very sincerely, yet in my judgment the features of secrecy in regard to the preparation of cases and their trial in Court must be abolished. A case must

be so prepared in a lawyer's office that if every word said was taken by a dictagraph, neither the lawyer nor the client nor the witness should have reason to blush for one word that had been said."

"Mr. Taft's position is in effect that something is more important in the trial of a cause than that the truth should be disclosed. In my judgment nothing is more important than the disclosure of the truth. Any rule or custom or law or ethical standard that prevents any person knowing the truth from disclosing the truth in court in the interests of justice, is indefensible."

Mr. Taft says in effect, that if clients could not disclose in confidence to their attorneys their guilty and filthy secrets with the assurance that they would be thus safe, our profession would be put out of business. This means that the necessary function of our profession is to receive confession of guilt or admissions that our client's claims are unjust, and still by failure to disclose the truth, attempt to show that the guilty client is not guilty, or that the client's unjust cause is a just one.

"Under such a standard of duty is it to be wondered at that the public have become inclined to believe that lawyers, in arguing as true things that they know are not true, or arguing as innocent a man whom they know to be guilty as insincere and dishonest ?

"I am glad to say that I believe that the function of our profession in society and in the Court is a nobler one, and that the standards of honest conduct of high-minded men in the community are likely to be established as the standards of proper conduct of attorneys in court."

"I do not believe that lawyers will be obliged to go out of business if they are no longer permitted or required to conceal the truth, but, upon the other hand, are compelled, in the interests of justice to disclose the truth." *The Green Bag March,* 1914.

CONTEMPORARY LEGAL LITERATURE.

American judicial opinion seems to be divided as to the liability of persons for injuries negligently inflicted on trespassers. The Courts that follow the lead of Massachusetts hold that the

landowner owes no duty to the trespasser and is not liable in the absence of intentional injury while the other set of Courts which follow the view of the Michigan Court say that even a trespasser is not beyond the pale of law and any negligence resulting in injury renders the owner liable. Mr. Robert J. Peaslee discussing the question in the *Harvard Law Review for March* 1914, declares in favour of the latter view. He thinks that the former view is due to the sentiment that the tramp should not be put on the same footing as an invited guest and really involves a fallacy. Law has passed the stage of judging men's conduct in these matters by an internal standard. The standard applied is an external one, what a reasonable man would under the circumstances do. The precautions that a reasonable man would take would necessarily differ according as it is an invitee or a trespasser that is concerned. In no case, can he be expected to take precaution so as to prevent harm to an unseen trespasser. Nor would the application of such a standard involve the conferring of any right on the wrong doer. When you say that the defendant is negligent what you really mean is that the plaintiff's wrong was only the occasion for the committing of the wrong by the defendant. The view of the Michigan Courts applies the standard of reasonableness while the Massachussets view introduces an exception to the rule by the use of the confusing and philosophically meaningless term " intentional injury ".

Mr. Costigan discusses the classification of trusts and fundamental characteristics of each of the classes. He discards the classification of express and implied adopted by Lewin and Perry as unphilosophical, the distinction between the two classes of trusts being in substance only one between clear and less clear words. Both are cases of trusts created by express words. The only classification based on tangible distinction is according to him the one into Express, Resulting and Constructive trusts. Resulting trusts are trusts implied in fact by law. Constructive trusts are trusts implied in law. The usual kinds of resulting trusts are where a conveyance is made voluntarily, where a conveyance is made on trust but the trust is not declared at all or is not fully declared and where the conveyance is taken in one person's name and the consideration is supplied by another. Conveyance on uses having been a common feature at

one time, the law inferred a *use* whenever there was no special reason for holding that it was intended to be absolute. In America, the tendency seems to be to hold that no trust results when there is a conveyance for a stated consideration A constructive trust is one where the Court holds that a man should not be allowed to unjustly enrich himself at another's expense. The jurisdiction is based on fraud real or constructive. The writer thinks that the usual method of classifying the trust inferred in the case, say of a sale to the wife with an oral declaration of trust which is inoperative owing to the Statute of Frauds but which is admitted to rebut the inference of advancement, under the heading of resulting trust. He thinks that properly speaking, such a trust should come under constructive trust.

A note by the Editor of the Medico—Legal Journal for June 1913, discusses the connection between Temperature and crime. Though there seems to be a slight rise in crimes of violence during the hotter portion of the year, there is little real connection between the two, at any rate the weather certainly can never attain the dignity of a criminal defence.

Mr. John Ross Passos of the New York Bar puts in a strong plea in favour of the accused being required to be the chief witnesses in criminal cases. One accused of crime should be treated liberally, he says, but maxims which enable or aid the guilty to escape should be abolished. The innocent are too happy to go upon the witness stand and especially would this be the case if cross-examination were limited to the meterial facts of the case. A privilege whose roots can be traced to the ecclesiastical system which prevailed centuries ago in England has no place in the free and cultivated soil of American Law and its extirpation will be hailed by the legal fraternity and the lay public as the first decisive step in the progress of law reform.

"Four things" said Socrates "belong to the Judge: to hear courteously, to answer wisely, to consider soberly and to decide impartially" Adds Mr. J. C. McWhorter (in the American Law Review, January-February) four things belong to the lawyer: to be courteous at all times, to be honest in all things, to be faithful to all clients and above all to be true to those higher demands of an exalted profession and of the public which such

profession first of all must serve. The writer appeals to the lawyers to be courteous to witnesses, not to bully them or indiscriminately abuse them. No lawyer in testing a witness on cross-examination ought to make him feel the sting of a cruel humiliation. The witness who is so abused and humiliated never gets over it. To the very end, he carries a bitter resentment against the lawyer, the Court and the legal system that allowed it. The establishment of the People's Court in Germany and the Debtor's Court in Kansas from which lawyers are excluded represents a powerful protest against the methods and procedure in which lawyers appear. The pouncing upon every witness and under one pretext or another, holding him up to scorn, ridicule and public contempt, discredits the machinery of justice and makes the public shun the witness box. Part of the responsibility for this rests on Judges. As Bentham says— "Browbeating is a sort of offence which can never be committed by any advocate who has not the judge for an accomplice. The writer also says that in the name of courtesy, courtesy to the Bar, courtesy to the Bench and by the Judges towards each other much injustice is done to the public. Justice is delayed in some cases, and defeated in others. The writer vigorously protests against such "abuses of courtesy."

BOOK REVIEWS.

Mahomedan Personal Law, according to the Hanafite School, by Mohammad Kadri Pasha, translated by Wasey Sterry M. A., Barrister at Law and N. Abcarius Ph. M., L.L.B., 1914. Spott is Woode and Co., Ltd., New Street Square, E. C.

In recent years the literature on Mahomedan Law, available in English, has been steadily growing and the above volume published under the auspices of the Sudan Government is, though modest in aim, not without its usefulness. Readers of Mr. Abdur Rahman's " Institutes of Mussalman law " will find the scheme of the present volume familiar. A Code of Mussalman law was prepared more than thirty years ago by a Council of *Ulemas* commissioned by the Egyptian Government, under the Presidency of Kadri Pasha and the present volume is a translation of that code. Intended for the use of British Magistrates in the Sudan, the book contents itself with an accurate but readable translation of the

code without being encumbered by any notes or references to original authorities; and there is of course no reference to any case law. The work covers the whole of what is ordinarily classed as "Family law," *viz.* the subjects of Marriage and Divorce, Sonship and Guardianship and Inheritance, and there are also two sections on Donations *inter vivos* and Wills. There is at the end of the book a useful table of inheritance from which the shares of different heirs in different contingencies may be quickly ascertained. It is scarcely necessary to add that the get up of the book is all that could be desired.

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All India Century Digest (*Civil*) 1811—1912 by Mr. B. R. Desai, High Court Pleader, Baroda, Vol. II. This volume brings us to the end of Mr. Desai's Century Digest (Civil) Mr. Desai deserves to be congratulated for the promptness and thoroughness with which he has carried his vast undertaking to a successful issue. We have already expressed our appreciation of the plan and work of Mr. Desai as we were noticing the earlier volumes and we are glad to say that larger acquaintance has not given us any ground for revising the opinion already expressed by us, on the other hand we think it no exaggeration to say that with these volumes of Mr. Desai and the Companion Index volume which we shall presently notice, it should be easy for any practitioner to collect the case law on any given subject at the shortest possible notice with few chances for omissions.

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Desai's Point noted Index of cases by Mr. B. R. Desai, Pleader, Baroda, 1914. Price, Rs. 12. Mr. Desai's Index has become so well-known to the profession that we need hardly dwell upon its many points of excellence. We note with pleasure the attempt made to classify cases according to points on which each case has been followed, distinguished &c. which cannot fail to enhance the utility of the book.

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Mayne's Hindu Law and usage, 8th Edn. by Sir C. Sankaran Nair.

Published by Messrs. Higginbotham & Co., Mount Road, Madras, Price, Rs. 20. Mayne's book has become a classic and any interference with its text is a sacrilege. Some such idea has prevented the publishers from availing themselves of the advantage of a thorough reivrsion by the Editor who by his erudition and

experience as a judge was eminently fitted for the task. Whatever the wisdom of the course adopted from the point of view of sentiment, we cannot help thinking that a splendid opportunity of bringing Mayne up to date has been thrown away from considerations of sentiment. Many of the opinions of Mr. Mayne, as rightly observed by Sir C. Sankaran Nair, require reconsideration in the light thrown by the Sacred Books of the East since published. As it is, we can only hope that the Publishers and the Editor will soon find their way to bring out a thoroughly revised edition of Mr. Mayne's book. With many ambitious rivals in the field, even from a business point of view such a course might be not altogether unnecessary. Subject to these remarks we welcome this edition of Mr. Mayne's book. We see that no pains have been spared to note up all the cases with additions to the text and the footnotes whenever necessary. Omission of a fuller reference to non-official journals may be felt by some to be a disadvantage, but on the whole it cannot be said to detract from the usefulness of the work. The book has been made more handy though we see that there are more pages in this than in the last edition. The get up is excellent and fully up to the level of the previous editions.